



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C.L. "BUTCH" OTTER

Governor

GARY SPACKMAN

Director

May 10, 2013

Daniel V. Steenson
Sawtooth Law Offices, PLLC
1101 W. River St., Ste. 110
P.O. Box 7985
Boise, ID 83707

Re: Request for Confirmation and Instruction Regarding Water District 73 Watermaster
Regulation of Water Supply Bank Rental

Dear Mr. Steenson:

I am writing in response to your April 22, 2013 letter requesting instruction regarding water master regulation of a water supply bank rental agreement for water rights from Sulphur Creek.

Your letter asserts that the regulation of water right nos. 73-12206, 73-12207, 73-12208, 73-12209, 73-12210, and 73-12211 as rented for in-stream flow in the Pahsimeroi River shall be subject to the terms and conditions of water right no. 73-7045.

Delivery of water rights 73-12206 through 73-12211 is subject to the terms and conditions of the Water Supply Bank rental agreement, as approved by the Director of the Idaho Department of Water Resources (IDWR). The terms and conditions of Water Right 73-7045 apply to that right as it is regulated in priority with other water rights from the Pahsimeroi River and tributaries. The rental agreement for rights 73-12206 through 73-12211 provides that the rights are to be delivered to the place of use described under right 73-7045. The Department does not interpret this to mean that rights 73-12206 through 73-12211 are subject to the same terms and conditions as right 73-7045. The conditions of the rental agreement do not indicate that the rented rights assume the same conditions as right 73-7045. Delivery of the rented rights shall be made in accordance with their respective authorized priority dates.

The Watermaster for Water District 73 should regulate the rental through the following actions:

- Ensure that the 1.07 cfs rented for delivery under water rights 73-12206 through 73-12211 is left in Sulphur Creek at the original points of diversion under the rights located at the SWSW and SENW of Section 24, T14N, R14E (these are the locations of the two main points of diversion for Big Creek Ranch). This ensures that the water rented from the Bank is not diverted for irrigation.

- Delivery of the combined 1.07 cfs under rights 73-12206 through 73-12211 must be made in accordance with the priority dates of the individual rights. The 1.07 cfs spill may need to be reduced by the amount under each individual right that is not deliverable by priority.
- The combined 1.07 cfs spill shall be delivered down Sulphur Creek to the Pahsimeroi River to the extent the individual priority rights are deliverable by priority. However, IDWR understands that the Sulphur Creek channel is currently intercepted by a ditch and the rented water may not physically reach the river. IDWR further recognizes that a project is planned to either remove the ditch obstacle or flume/siphon the Sulphur Creek channel across the ditch so that the creek channel connects to the river. As a result, IDWR understands that the delivery of the rented water to the river channel and intended place of use under the rental may be delayed for one to two years. Nonetheless, the rented rights should remain undiverted from Sulphur Creek as they are not authorized to be diverted for other uses.
- This direction does not limit or prohibit the watermaster from delivering water to other priority rights on Sulphur Creek or the Pahsimeroi River in accordance with priority dates.

A copy of this letter has been forwarded to the Water District 73 Watermaster. The watermaster is therefore instructed to follow the guidance provided herein.

Sincerely,



Tim Luke
Water Compliance Bureau

- c. Ted O'Neal, Water District 73 Watermaster
Brian Patton, IDWR
IDWR Eastern Region

Mailing Address

P.O. Box 7985
Boise, Idaho 83707

Boise Office

Golden Eagle Building
1101 W. River St., Ste. 110
Boise, Idaho 83702
Tel. (208) 629-7447
Fax (208) 629-7559

Challis Office

1301 E. Main Ave.
P.O. Box 36
Challis, Idaho 83226
Tel. (208) 879-4488
Fax (208) 879-4248

Twin Falls Office

161 Fifth Avenue South
Twin Falls, Idaho 83301



**SAWTOOTH LAW
OFFICES, PLLC**

April 22, 2013

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DEPARTMENT OF
WATER RESOURCES

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BY EMAIL AND U.S. MAIL

Tim Luke
Idaho Department of Water Resources
322 East Front Street
PO Box 83720
Boise, Idaho 83720-0098

Re: Request for Confirmation and Instruction Regarding Water District 73
Watermaster Regulation of Water Supply Bank Rental

Dear Tim:

I am writing on behalf of the Water District 73 Advisory Committee to request confirmation and instruction regarding Watermaster Ted O'Neal's regulation of the enclosed Water Supply Bank rental.

The Water District 73 Advisory Committee retained me to advise them as to whether the rental would be subject to Pahsimeroi River irrigation diversion practices. The place of use of the rental is described as "within the Idaho Water Resource Board's Minimum Stream Flow Right No. 73-7045." A copy of the partial decree for that water right is enclosed. Although the Rental Agreement's conditions of water use do not mention water right no. 73-7045, I advised the Water District 73 Advisory Committee that the rental is subject to all of the terms and conditions of that right. As you will see, use of water right no. 73-7045 is subject to all irrigation diversion practices existing at the time the application for permit on 12/12/79 was filed. Those practices are described in the enclosed Amended Memorandum Decision and Order. Water right no. 73-7045 is subject to the following provision:

"[A]dministration of this right shall not prevent such existing reasonable diversions of excess waters in addition to recorded rights if all recorded rights, excluding this right, are then satisfied. The watermaster of Water District 73 is not authorized to control, for the purpose of delivering water to fill this license, the diversion of water to any land irrigated under a valid water right from Pahsimeroi River and tributaries with a priority date earlier than the priority of this right.

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Tim Luke
April 22, 2013
Page 2

I spoke with Brian Patton, who executed the Rental Agreement for the Idaho Water Resource Board, and he agreed that the rental is subject to the above-referenced conditions of water right no. 73-7045. He suggested that the Water District obtain a confirming instruction from you.

Please advise me at your earliest convenience if the understanding expressed in this letter is correct and instruct Water Master Ted O'Neal accordingly.

Thanks, and please don't hesitate to contact me if I may be of further assistance.

Sincerely,

Daniel V. Steenson

cc: Water District 73 Advisory Committee
enclosures

**STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
WATER SUPPLY BANK RENTAL AGREEMENT**

This is to certify that: IDAHO WATER RESOURCE BOARD
PO BOX 83720
BOISE ID 83720-0098
(208) 287-4800

filed an application to rent water from the Water Supply Bank ("Bank"). The Idaho Water Resource Board ("Board") being authorized to operate a Bank and to contract by and through the Director of the Idaho Department of Water Resources ("Director, Department") for rental of water from the Bank agrees to rent water as follows:

Summary of Water Rights or Portions Rented from the Bank

Water Right	Rented Rate	Annual Rented Volume	Total Rented Acres
73-12206	0.07 CFS	NA	NA
73-12207	0.11 CFS	NA	NA
73-12208	0.11 CFS	NA	NA
73-12209	0.13 CFS	NA	NA
73-12210	0.30 CFS	NA	NA
73-12211	0.35 CFS	NA	NA
COMBINED RENTAL TOTALS:	1.07 CFS	175.0 AF*	NA

*Annual use under this rental is limited to 125.0 AF.

TERM OF RENTAL: January 1, 2013, for an indefinite period

RENTAL FEE: \$1,230.50

The Department shall accept and retain \$1,230.50 as a one-time processing fee.

Detailed water right specific limitations and conditions attached.

The undersigned renter agrees to use the water rented under this agreement in accordance with the Water Supply Bank rules and in compliance with the limitations and conditions of use described in this agreement:

Dated this 2nd day of December, 20 12

By: BRIAN PATTON
(Print Name)

B. Patton
(Signature)
for the Idaho Water
Resource Board
(Title if on behalf of company or organization)

Having determined that this agreement satisfies the provisions of Idaho Code § 42-1763 and IDAPA 37.02.03.030 (Water Supply Bank Rule 30), for the rental and use of water under the terms and conditions herein provided, and none other, I hereby execute this Rental Agreement on behalf of the Idaho Water Resource Board this 3rd day of December, 20 12.

Mona VanBuren
for BRIAN PATTON, Administrator
Idaho Water Resource Board

WATER RIGHT NOS. 73-12206, 73-12207, 73-12208, 73-12209, 73-12210 and 73-12211

WATER SUPPLY BANK RENTAL AGREEMENT

The renter agrees to use the water rented under this agreement in accordance with the Water Supply Bank rules and in compliance with the limitations and conditions of use described below:

Renter: IDAHO WATER RESOURCE BOARD
PO BOX 83720
BOISE ID 83720-0098
(208) 287-4800

Priority Date: As on the water rights

Source: SULPHUR CREEK **Tributary to:** PAHSIMEROI RIVER

<u>BENEFICIAL USE</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
MINIMUM STREAM FLOW	04/01	to 10/31	1.07 CFS	175.0 AF*
	Total:		1.07 CFS	175.0 AF*

LOCATION OF RENTER'S POINT(S) OF DIVERSION:

SULPHUR CREEK (beginning of reach)	SW¼SW¼	Sec. 24	Twp 14N	Rge 21E	CUSTER County
SULPHUR CREEK (beginning of reach)	SE¼NW¼	Sec. 24	Twp 14N	Rge 21E	CUSTER County
SULPHUR CREEK (Lot 3) (end of reach)	SW¼NW¼	Sec. 25	Twp 16N	Rge 20E	CUSTER County

RENTER'S PLACE OF USE: MINIMUM STREAM FLOW

Place of Use is within the Idaho Water Resource Board's Minimum Stream Flow Right No. 73-7045.

CONDITIONS OF WATER USE

1. The use of water under this agreement shall be subject to the provisions of Idaho Code § 42-1766.
2. The water rented under this agreement is appurtenant to irrigation of 50.0 acres.
3. Rental of the specified right from the bank does not, in itself, confirm the validity of the right or any elements of the water right, or improve the status of the right including the notion of resumption of use. It does not preclude the opportunity for review of the validity of this water right in any other department application process.
4. Use of water under this agreement does not constitute a dedication of the water to renter's place of use and upon expiration of this agreement, the points of diversion and place of use of the water shall revert to those authorized under the water right and/or again be available to rent from the bank.
5. This rental does not grant any right-of-way or easement to use the diversion works or conveyance works of another party.
6. Use of water under this agreement shall not prejudice any action of the Department in its consideration of an application for transfer or permit filed by the applicant for this same use.
7. Renter agrees to comply with all applicable state and federal laws while using water under this agreement.
8. Renter agrees to hold the Board, the Director and the state of Idaho harmless from all liability on account of negligent acts of the renter while using water.

WATER RIGHT NO. 73-12206, 73-12207, 73-12208, 73-12209, 73-12210 and 73-12211

WATER SUPPLY BANK RENTAL AGREEMENT

CONDITIONS OF WATER USE

9. Renter acknowledges and agrees that the Director may terminate diversion of water if the Director determines there is not a sufficient water supply for the priority of the right or portion thereof being rented.
10. Failure of the renter to comply with the conditions of this agreement is cause for the Director to rescind approval of the rental agreement.
11. Use of water under this agreement will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 73.
12. *Annual use under this rental is limited to 125.0 acre-feet.
13. The rights listed below are limited to the irrigation of a combined total of 951.1 acres in a single irrigation season: Combined Right Nos.: 73-2B, 73-7A, 73-7B, 73-8B, 73-113, 73-140, 73-2164, 73-7000, 73-12206, 73-12207, 73-12208, 73-12209, 73-12210, and 73-12211.
14. After the deduction of this rental, the rights listed below are limited to the irrigation of a combined total of 901.1 acres in a single irrigation season. Combined Right Nos.: 73-2B, 73-7A, 73-7B, 73-8B, 73-113, 73-140, 73-2164, and 73-7000.

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DEPARTMENT OF
WATER RESOURCES

In Re SRBA

Case No. 39576

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR

Water Right 73-07045

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

MAR 12 2010

By

Clerk

Deputy Clerk

NAME AND ADDRESS:

STATE OF IDAHO
IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720
BOISE, ID 83720-0098

SOURCE:

PAHSIMEROI RIVER TRIBUTARY: SALMON RIVER

QUANTITY:

74.00 CFS

The flow is divided into two reaches: 1) Lower Reach - 74.0 cfs from the confluence of the Pahsimeroi River and the Salmon River, upstream about 4 miles to the point of injection of Big Springs 2) Upper Reach - 45.0 cfs from the point of injection of Big Springs, upstream about 3 miles to the discharge point of the fish rearing and release ponds in the NWNW, S21, T15N, R21E.

PRIORITY DATE:

12/19/1979

POINT OF DIVERSION:

T15N R21E S08	NWNW	(Instream Ending Point)	Within Custer County
	NWNW	(Instream Beginning Point)	
S21	NWNW	(Instream Beginning Point)	
T16N R20E S25 LOT 3	(SWNW)	(Instream Ending Point)	

PURPOSE AND

PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Minimum Stream Flow	01-01 TO 12-31	74.00 CFS

The use of water under this right shall recognize all reasonable irrigation diversion practices on the Pahsimeroi River and tributaries in existence at the time of the filing of the application for permit on 12/12/79. Existing irrigation practices, for the purpose of this condition, are evidenced by maps, photographs, data and measurements referenced in the Amended Memorandum Decision and Order issued at the time of permit approval on 1/9/86. In particular, administration of this right shall not prevent such existing reasonable diversions of excess waters in addition to recorded rights if all recorded rights, excluding this right, are then satisfied. The watermaster of Water District 73 is not authorized to control, for the purpose of delivering water to fill this license, the diversion of water to any land irrigated under a valid water right from Pahsimeroi River and tributaries with a priority date earlier than the priority of this right. Use of water under this right shall be non-consumptive.

PLACE OF USE:

The place of use of this right is within the designated stream reaches described between the beginning and ending points described above.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The Director retains jurisdiction to review and amend any and all parameters of this right. The Board, upon receiving a request, or upon its own initiative, may petition the Director for an amendment to the right. The petition must set forth any significant change in circumstances and evidence of public

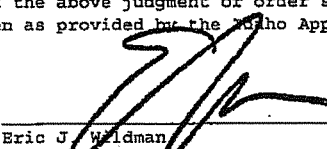
OTHER PROVISIONS (continued)

interest supporting the proposed amendment. The Director will notify the general public and specific persons, or known interested parties of the proposed change, and conduct a hearing for the purpose of determining whether the right should be amended in the public interest. The burden of proof at the hearing shall be upon the persons or parties seeking the amendment to establish that the amendment of the right would be in the public interest.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


Eric J. Waldman
Presiding Judge of the
Snake River Basin Adjudication

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 73-7045)	AMENDED
TO ESTABLISH A MINIMUM STREAM FLOW IN THE PAHSIMEROI)	MEMORANDUM DECISION
RIVER IN THE NAME OF THE IDAHO WATER RESOURCE BOARD)	AND ORDER

On January 4, 1984, the Director of the Department of Water Resources (Department) issued a Memorandum Decision and Order approving application for water right permit No. 73-7045, subject to seven (7) specific conditions of approval.

On January 25, 1984, the Idaho Department of Fish and Game (Fish and Game) submitted a Request for Rehearing in the matter, based on objections to Conditions of Approval Nos. 2 and 6 in the Memorandum Decision and Order, which pertain to recognition of existing reasonable irrigation diversion practices, and to establishment of a periodic review of the permit or subsequent license by the Director.

On March 22, 1984, the Director issued an Order which denied the Request for Rehearing. In accordance with Section 42-1701A(4), Idaho Code, on April 18, 1984, Fish and Game appealed the matter to the Fourth Judicial District Court and sought removal of Conditions of Approval Nos. 2 and 6.

On April 30, 1984, Water District No. 73 filed a Notice of Cross Appeal, and Cross Petition for Judicial Review with the District Court and requested that in the event Conditions of Approval Nos. 2 and 6 are set aside, that the entire permit be set aside.

After the filing of the appeal and the cross appeal, the parties

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engaged in negotiations to settle the litigation. A Stipulated Agreement which includes modification of Conditions of Approval Nos. 2 and 6 was signed by all parties during the period January 3, 1986, through January 6, 1986. Consequently, on January 6, 1986, the District Court issued an Order Remanding Cause to the Idaho Department of Water Resources for the purpose of permitting the Department to modify and revise Conditions of Approval Nos. 2 and 6 in accordance with the Stipulated Agreement of the parties. For clarity, the entire modified memorandum decision and order is shown hereinafter, with modifications to Conditions of Approval Nos. 2 and 6 incorporated pursuant to the Stipulated Agreement.

BACKGROUND INFORMATION

On December 12, 1979, the Idaho Water Resource Board (Board) filed with the Department an application for permit to appropriate water to preserve a minimum stream flow in the Pahsimeroi River tributary to the Salmon River. The application was filed in accordance with the provisions of Chapter 15, Title 42, Idaho Code.

Notice describing the proposed appropriation and setting the time and place for the required hearing was published in the Challis Messenger, on June 12 and June 19, 1980.

Parties appearing in a formal capacity included representatives from the Board and Fish and Game, Mr. J. R. Bennetts representing the water users comprising Water District 73, and Mr. L. L. Anderson representing the Central Idaho Mining Association. Testimony was also presented by staff of the Department. Individuals appearing to present views and comments as public witnesses included Mr. Syd Dowton, Mr. Jimmie S. Dowton, Mr. Roy Ellis, Mr. Don O'Neal, Mr. Don Blatz, Mr. James N. Hawkins, and State Representatives Ray Infanger and Wayne E. Tibbitts.

After the hearing the Board requested the Department to withhold further action on the application, pending further investigation of existing water rights and the merits of the application. On November 8, 1980, the Board adopted guidelines to supplement the statutory requirements of the approval procedure. The guidelines provide for an informal public meeting to be conducted by the Board to evaluate the need for establishing a minimum stream flow.

Based on the guidelines, notice of an informal public meeting was advertised in the Challis Messenger and the Recorder Herald (Salmon), and all parties that earlier had shown an interest in the matter were mailed notice of the meeting. The meeting was conducted by the Board in Challis on November 18, 1981, and was attended by about 40 individuals. Board members present were provided with additional information and public comment regarding the proposed minimum stream flow.

On April 20, 1982, the Chairman of the Board amended the application by reducing the requested flow rates and by dividing the seven mile long reach into two sub-reaches. Notice describing this amended application and setting the time and place for another hearing was published in the Challis Messenger on August 19 and August 26, 1982, and in the Salmon Recorder Herald on September 9 and September 16, 1982. The Director of the Department, A. Kenneth Dunn, served as the hearing officer.

All parties that appeared in a formal capacity at the July 9, 1980, hearing were again represented at the September 24, 1982, hearing with the exception of Mr. L. L. Anderson, who did not appear. Formal testimony was again presented by the staff of the Department. Individuals appearing to present views and comments as public witnesses included Mr. Jimmie S. Dowton, Mr. Syd Dowton, Mr. Roy Ellis, and Mr. Larry Wymer, who represented Idaho Power Company.

In addition, Mr. Rance Bare appeared as an expert witness at the request of Mr. Bennetts. The following issues were raised as relevant to this matter:

1. Will the proposed minimum stream flow interfere with other water rights and with existing water uses?

Water users in state Water District No. 73 expressed concern that establishment of a minimum stream flow would limit delivery of existing rights to the rates of diversion recorded in the decree or another water right document. The present practice of using excess flows as they occur during spring runoff was described as being necessary for the present irrigation systems and as having a beneficial effect of temporarily storing water which enhances stream flows during late summer and fall.

Concern was also expressed that all existing rights have not been recorded and cannot be protected if the minimum stream flow must be maintained.

2. Is the proposed minimum stream flow in the public interest as opposed to the private interest?

Concern was expressed that establishment of a minimum stream flow would prevent future development of the Pahsimeroi River and tributaries. Establishment of the minimum stream flow was also said not to be in the public interest because the primary purposes were described as helping a private corporation to meet its obligation to mitigate damage to anadromous fisheries resulting from its hydropower development on other rivers.

3. Is the minimum stream flow needed for the purposes requested and are the requested purposes authorized by the minimum stream flow law?

The requested rate of flow was questioned as being greater than that needed to protect the uses identified in the application. The Water District 73 water users questioned whether a minimum stream flow could be used to "establish" an anadromous fish run because the minimum stream flow statutes require the flow to be necessary for the "protection" of fish and wildlife

habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation or water quality". (Section 42-1501, Idaho Code. Emphasis added.)

4. Are the flows requested capable of being maintained?

Concern was expressed that the rates of flow requested exceed those observed in the river, particularly in the upper stream reach.

5. Procedural issues.

Water District 73 water users questioned whether the Board had met its burden of proof in support of the application, and whether the Board had considered the request for filing the application within the time period established by law. Idaho Power Company requested that approval of the minimum stream flow request be subordinated to its two junior applications seeking to divert water for fish propagation purposes. Water District 73 water users objected to the subordination and questioned the Board's authority to grant all or part of a right held on behalf of the public to a private interest.

Based upon sworn testimony, documentation and public statements included in the record from the two hearings, and upon his understanding of the law, the Director of the Department finds the following Findings of Fact, and makes the following Conclusions of Law, and Order:

FINDINGS OF FACT

1. On December 11, 1979, Fish and Game requested the Board to apply for a minimum stream flow on the Pahsimeroi River. On December 12, 1979, pursuant to provisions of Chapter 15, Title 42, Idaho Code, the Board filed application for permit No. 73-7045 to appropriate a minimum stream flow in the Pahsimeroi River tributary to the Salmon River.

2. On April 20, 1982, the Board amended application for permit No. 73-7045 and now proposes to appropriate a minimum stream flow for two reaches in the Pahsimeroi River. The rate of flow in the lower reach, which extends

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from the confluence with the Salmon River in Lot 3 (SW1/4NW1/4) Sec. 25, Twp. 16N, Rge. 20E, B.M., upstream about 4 miles to the point where Big Springs enters the Pahsimeroi in the NW1/4NW1/4, Sec. 8, Twp. 15N, Rge. 21E, B.M., is 74 cubic feet per second. The rate of flow in the upper reach, which extends from the point where Big Springs enters the river upstream to the discharge outlet of the fish rearing and release ponds, located in the NW1/4NW1/4, Sec. 21, Twp. 15N, Rge. 21E, B.M., is 45 cubic feet per second.

3. Based upon testimony of the staff of the Department, it is found that various water rights are diverted from the Pahsimeroi River and tributaries upstream from and throughout the minimum stream flow reaches. These water rights are identified by permits, licenses, claims and decrees. In addition, unrecorded beneficial use water rights may be diverted upstream from and throughout the minimum stream flow reaches. Procedures are available to claim and have such rights recognized through summary supplemental adjudications.

4. Any right acquired under application for permit No. 73-7045 is for instream nonconsumptive use and will be subject to all vested water rights, permits and water right applications having priority dates earlier than December 12, 1979.

5. Based on the testimony of local water users and documentation in the record, it is found that excess irrigation flows are diverted from the Pahsimeroi River and applied to lands within the Pahsimeroi River Drainage Basin. It is found that in some instances the diversion of excess flows has the effect of providing temporary storage as groundwater which later returns to the river to increase stream flow during late summer and fall.

6. On April 7, 1982, the applicant adopted Policy Statement of Idaho Water Resource Board on Pahsimeroi River which included the following determination: "The historic manner of operation by those holding upstream,

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midstream and downstream water rights has been compatible with the high quality native and hatchery fishery."

7. Based upon testimony of Fish and Game and upon public interest testimony presented at the hearings and evidenced by letters officially noticed at the hearings, it is found that the maintenance of an anadromous fishery and a native trout fishery in the Pahsimeroi River is in the public interest.

8. Based upon testimony presented at the hearing, it is found that the benefits to be derived from the minimum stream flow will be enjoyed by members of the public as opposed to being limited to private use or enjoyment.

9. Based upon the testimony and exhibits presented at the hearing, including Fish and Game Exhibit 21, it is found that the minimum stream flows proposed by amended application No. 73-7045 are necessary to maintain salmon and steelhead spawning, migration, and rearing habitat in the river.

10. Based upon the testimony, documentation, and public statements comprising the record in this matter, it is found that the minimum instream flows proposed by amended application No. 73-7045 are necessary to maintain the existing trout passage, spawning and incubation habitat of the stream area in the two specified reaches.

11. Based upon testimony and evidence submitted, it is found that the flow requested in the application is the minimum stream flow required to preserve the existing unique characteristics of the stream for the public benefit in the two specified reaches, and is not the ideal or most desirable flow which could be utilized for that purpose.

12. The purpose of the proposed minimum stream flow appropriation is to maintain trout and salmon spawning, migration, and rearing habitat in the river.

13. Based upon testimony and evidence submitted concerning available flow measurement data, it is found that the minimum stream flows proposed for

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the Pahsimeroi River are usually, but not at all times, capable of being maintained.

14. Two applications for permit to appropriate waters from the Pahsimeroi River have been filed by the Idaho Power Company with priorities after December 12, 1979. Application No. 73-7051 is for 10.0 cubic feet per second for fish propagation purposes to be used at the fish rearing and release ponds in Sec. 21, Twp. 15N, Rge. 21E, B.M. This rate of flow is intended to be added to the existing 10 cubic feet per second water right for the ponds. Application No. 73-7055 is for 40 cubic feet per second for fish propagation purposes to be used at the fish egg taking facility, located within Sec. 25, Twp. 16N, Rge. 20E, B.M. This rate of flow is requested for the period from December 1 through February 29 annually, and is intended to complement the existing water right for the facility, which is valid from March 1 through November 30, annually.

ANALYSIS

The proposed minimum stream flow would not interfere with any existing water rights. However, the existence of a minimum stream flow could interfere with existing water diversion practices, since many of the irrigation diversions from the river are in excess at some times of the rates provided in the existing water rights of record. Porous soils and the fact that abundant river water supplies have traditionally been available in the vicinity of the minimum stream flow reaches, have combined to encourage water use significantly in excess of amounts allowed by licenses, permits, decrees and beneficial use rights. A significant amount of testimony and information in the record suggests that there are positive effects to the river through recharge of the shallow aquifer that results from application of irrigation water to lands within the Pahsimeroi River Drainage Basin. Due to the geology of the basin, it appears that water

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applied to certain lands within the basin in excess of consumptive needs of the crops, is transmitted to the river. The effect of this relationship is that some springs tributary to the river appear to have a greater flow than if no irrigation occurred. Therefore, the amount of water in the river and thus the instream values sought to be maintained by the proposed minimum stream flow are enhanced by irrigation of lands located within the topographic boundary of the Pahsimeroi River Basin.

If water rights on the Pahsimeroi are regulated by a watermaster, existing uses could be affected in two ways. First, diversions based on licenses, permits and decreed rights could be limited to the recorded amounts. Second, beneficial use rights could be shut off if any licenses, permits or decreed rights are not satisfied. Holders of beneficial use rights would be forced to have their rights decreed to allow delivery by the watermaster. Therefore, the existence of a minimum stream flow permit, which did not allow for these existing uses, could cause traditional diversions to be restricted, significantly affecting existing water uses.

The existing irrigation practices appear to enhance the stream values intended to be protected by the minimum stream flow and are in the public interest. Establishment of a minimum stream flow should in this case include conditions to prevent interference with such irrigation practices.

Idaho Power Company has asked that the minimum stream flow rights be subordinated to its two junior filings for fish propagation purposes. A review of the fish propagation filings shows that the filing for the upstream rearing facility would return essentially undiminished any water diverted to a point above the upper minimum stream flow reach. The filing for the downstream egg-taking facility complements an existing right for the same diversion rate by extending the annual period of use to include the entire year. The winter

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month period added by the new filing is not normally the annual low flow period (IDWR Exhibit 2). Sufficient water is, therefore, available for the new filing, the minimum stream flow and other existing uses. Therefore, a need does not appear to exist to consider the subordination of the minimum stream flow to the junior filing nor to address the legal questions raised concerning authority to do so.

Evidence was provided at the hearings to demonstrate that the public interest will be served by establishing a minimum stream flow in the Pahsimeroi River. Minimum stream flows are needed to maintain salmon spawning, migration and habitat and to maintain the habitat and spawning areas for resident trout species. In addition, testimony was received that the minimum stream flow provides wildlife habitat and recreation values all of which are uses as defined within Section 42-1501, Idaho Code. The importance of these instream values is merely emphasized by the presence of the Idaho Power Company mitigation program for anadromous fish. While this program is funded by a private company, it exists because of the recognized public interest in maintaining and restoring anadromous fish populations. It is entirely proper to use the minimum stream flow law to protect the natural waterways needed for the mitigation program. For this reason, the purposes of the requested minimum stream flow are found to be within the scope of the minimum stream flow law.

Public interest is a dynamic factor subject to change as the needs and desires of the people in the Pahsimeroi River area and throughout Idaho evolve. A perpetual commitment of a significant amount of water to a use without a workable method of changing the terms of that use could at some future time adversely affect the public interest. Approval of a minimum stream flow for the Pahsimeroi River should provide for a periodic review of the continued public interest.

CONCLUSIONS OF LAW

1. The proposed minimum stream flow appropriation will not interfere with any vested water right, permit, or right under an application, having a priority date earlier than December 12, 1979.

2. The proposed minimum stream flow appropriation is in the public, as opposed to private, interest.

3. The proposed minimum stream flow appropriation is necessary for steelhead and rainbow trout and salmon spawning, migration, and rearing habitat in the river.

4. The proposed minimum stream flow is the minimum flow required for the purposes cited in Conclusion of Law No. 3 and not the ideal or most desirable flow.

5. The proposed minimum stream flow is usually capable of being maintained in the requested reaches of the Pahsimeroi River.

6. Minimum stream flow application No. 73-7045 is senior in priority date to applications for permit Nos. 73-7051 and 73-7055 in the name of Idaho Power Company.

7. The Board's consideration of the minimum stream flow request represented by application No. 73-7045 was within the time period provided by law.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that Application for Permit No. 73-7045 is APPROVED subject to the following conditions:

1. Upon the future finding and order of the Director that additional gauging stations are required to maintain the approved minimum stream flows of the Pahsimeroi River such measuring devices shall be permanently installed and maintained as specified by the Director.

2. The use of water under this permit shall recognize all reasonable irrigation diversion practices on the Pahsimeroi River and tributaries existing at the time application No. 73-7045 was filed (December 12, 1979). Existing irrigation practices, for the purpose of this condition, are evidenced by the following maps, photographs, data and measurements referenced below and incorporated herein by this reference, as well as by any appropriate additional evidence agreed to by the parties which may be subsequently obtained:

- (1) 1980 Landsat satellite data for the Pahsimeroi River Basin registered upon Challis NE, Challis SE, May NW, May SW and May SE 1:24,000 orthophoto quadrangle maps depicting irrigated acreage.
- (2) Summary Hydrograph Data for Pahsimeroi River NR May Station 13302000 for the periods from January 1930 through December 1959 and May 1971 through December 1972.
- (3) The results of the U.S.G.S. inflow/outflow study of the reach of the Pahsimeroi River from Downton Lane to Burstedt Lane conducted May 21-24 and June 18-20, 1985, and any subsequent data which may be collected by the U.S.G.S. for the Pahsimeroi River Basin.
- (4) Resource scale aerial photographs of the Pahsimeroi River Basin taken by agencies of the United States Government prior to December 12, 1979 depicting the number and location of water diversion structures.
- (5) Photos, measurements or other reliable evidence or data depicting the physical features and capacities of the various water diversion structures within the Pahsimeroi River Basin from the mouth of the Pahsimeroi River to the Hooper Lane Bridge collected by a party to this proceeding.

In particular, administration of this permit shall not prevent such existing reasonable diversions of excess waters in addition to recorded rights

if all recorded rights, excluding the right under this permit, are then satisfied. In this regard, the watermaster of Water District 73 is not authorized to control, for the purpose of delivering water to fill the right authorized under this permit, the diversion of water to any land irrigated under a valid water right from Pahsimeroi River and tributaries prior to December 12, 1979.

3. Proof of instream beneficial use of the minimum stream flow appropriated shall be submitted in a manner approved by the Department on or before January 1, 1991. The proof submitted shall include at least three years of flow data for the water course and data to document usage in accordance with the purposes permitted. The frequency of data accumulation must be submitted to the Director for review and approval.

4. The use of water under this permit shall be nonconsumptive.

5. The use of water under this permit is subject to all prior rights.

6. The Director retains jurisdiction to review and amend any and all parameters of this permit and subsequent license upon his determination that the public interest is no longer served by the minimum stream flow as established. The Director may review the permit and subsequent license 15 years after issuance of either the permit or the license.

7. The application hereby approved by the Director shall be submitted to the Idaho Legislature by the fifth day of the current legislative session and the Director's approval shall not become finally effective until approved by the legislature pursuant to the procedure provided by Section 42-1503, Idaho Code.

Dated this 9th day of January, 1986.



A. KENNETH DUNN, Director

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